

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PAUL W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. C19-5907 TLF

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his application for disability insurance benefits. The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

- A. Did the ALJ harmfully err in rejecting plaintiff's symptom testimony?
- B. Did the ALJ harmfully err in evaluating the medical opinion evidence?
- C. Did the ALJ harmfully err in evaluating the impact of plaintiff's obesity on his impairments?

1 II. DISCUSSION

2 The Commissioner uses a five-step sequential evaluation process to determine if
 3 a claimant is disabled. 20 C.F.R. § 404.1520. The ALJ assesses the claimant's residual
 4 functional capacity ("RFC") to determine, at step four, whether the plaintiff can perform
 5 past relevant work, and if necessary, at step five to determine whether the plaintiff can
 6 adjust to other work. *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). The ALJ
 7 has the burden of proof at step five to show that a significant number of jobs that the
 8 claimant can perform exist in the national economy. *Tackett v. Apfel*, 180 F.3d 1094,
 9 1099 (9th Cir. 1999); 20 C.F.R. § 404.1520(e).

10 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal
 11 error, or (2) the decision is not supported by substantial evidence. *Ford v. Saul*, 950
 12 F.3d 1141, 1154, 1159 (9th Cir. 2020). Substantial evidence is "such relevant evidence
 13 as a reasonable mind might accept as adequate to support a conclusion." *Biestek v.*
 14 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S.
 15 197, 229 (1938)). This requires "more than a mere scintilla," of evidence. *Id.* The Court
 16 must consider the administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995,
 17 1009 (9th Cir. 2014). It must weigh both the evidence that supports, and evidence that
 18 does not support, the ALJ's conclusion. *Id.*

19 The Court considers in its review only the reasons the ALJ identified and may not
 20 affirm for a different reason. *Id.* at 1010. Furthermore, "[l]ong-standing principles of
 21 administrative law require us to review the ALJ's decision based on the reasoning and
 22 actual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit
 23 what the adjudicator may have been thinking." *Bray v. Comm'r of Soc. Sec. Admin.*, 554
 24 F.3d 1219, 1225–26 (9th Cir. 2009) (citations omitted).

1 **A. The ALJ Partially Erred in Rejecting Plaintiff's Testimony**

2 Plaintiff argues the ALJ erred by rejecting his testimony, including with respect to
3 the side effects of his medications. Pl. Op. Br. (Dkt. 8), pp. 2–9. In weighing a plaintiff's
4 testimony, an ALJ must use a two-step process. *Trevizo v. Berryhill*, 871 F.3d 664, 678
5 (9th Cir. 2017). First, the ALJ must determine whether there is objective medical
6 evidence of an underlying impairment that could reasonably be expected to produce
7 some degree of the alleged symptoms. *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir.
8 2014). If the first step is satisfied, and there is no evidence of malingering, the second
9 step allows the ALJ to reject the claimant's testimony of the severity of symptoms if the
10 ALJ can provide specific findings and clear and convincing reasons for rejecting the
11 claimant's testimony. *Id.*

12 Plaintiff testified he stopped working in part due to a herniated disc in his back,
13 which caused enough pain to require oxycodone. AR 63–64. He testified he could not
14 perform his prior job, which involved carrying a firearm, while taking oxycodone. *Id.* He
15 testified the oxycodone limits his ability to drive and think clearly. AR 69–70, 245, 250,
16 252, 270, 277. Plaintiff testified his herniated disc restricts his range of motion in his
17 back and ability to lift or carry moderately heavy objects. AR 245, 250, 275. He testified
18 he has osteoarthritis in hands, so they seize up at times and he cannot perform tasks
19 requiring repetitive hand use. AR 75–77, 101. He testified he has problems with his hips
20 that limit his ability to sit or stand for prolonged periods of time. AR 245, 250, 275.

21 The ALJ found plaintiff's testimony regarding the severity of his symptoms was
22 "not entirely consistent with the medical and other evidence in the record." AR 20. The
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1 ALJ reasoned plaintiff's testimony was inconsistent with the overall medical evidence,
2 and plaintiff's activities of daily living. AR 22–24.

3 The ALJ erred in rejecting plaintiff's testimony as inconsistent with the overall
4 medical evidence. Inconsistency with objective evidence may satisfy the clear and
5 convincing requirement. *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d
6 1294, 1297 (9th Cir. 1998). But an ALJ may not reject a claimant's subjective symptom
7 testimony “solely because the degree of pain alleged is not supported by objective
8 medical evidence.” *Orteza v. Shalala*, 50 F.3d 748, 749–50 (9th Cir. 1995) (internal
9 quotation marks omitted). The ALJ noted the record contained some normal exam
10 findings, such as normal gait, muscle tone, and strength. See, e.g., AR 544, 558, 572–
11 73. The record also contained objective findings, such as an MRI, showing a herniated
12 or bulging disc in plaintiff's lumbar spine, mild to moderate osteoarthritis in plaintiff's hip
13 joints, and osteoarthritis in plaintiff's hands. See AR 562, 684, 878–79, 940. These
14 objective findings could support the degree of pain plaintiff alleged, so the ALJ erred to
15 the extent he rejected plaintiff's pain testimony based solely on the objective medical
16 evidence.

17 The ALJ also found that plaintiff received only conservative treatment. See AR
18 22. An ALJ may rely on conservative treatment in discounting a claimant's symptom
19 testimony. See *Parra v. Astrue*, 481 F.3d 742, 750–51 (9th Cir. 2007) (holding that over-
20 the-counter pain medication is “conservative treatment”). But consistent use of opioid
21 medications is generally not considered conservative treatment. See *Kager v. Astrue*,
22 256 F. App'x 919, 923 (9th Cir. 2007); *O'Connor v. Berryhill*, 355 F. Supp. 3d 972, 985

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1 (W.D. Wash. 2019) (collecting cases). Plaintiff was regularly taking oxycodone, so this
 2 was not a valid basis for rejecting plaintiff's symptom testimony.

3 The ALJ did not err in rejecting plaintiff's testimony regarding his hip and back
 4 symptoms as inconsistent with his activities of daily living. An ALJ may reject a plaintiff's
 5 symptom testimony based on his daily activities if they contradict his testimony or "meet
 6 the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
 7 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Plaintiff reported he was
 8 walking four miles, biking indoors, or working out with weights seven days a week. See
 9 AR 500, 640, 682. Plaintiff's frequent participation in these activities contradicts his
 10 testimony of lifting, sitting, and standing limitations. The ALJ therefore did not harmfully
 11 err in rejecting plaintiff's testimony regarding the severity of his hip and back pain, as
 12 this reason remains valid regardless of the ALJ's other errors. See *Molina v. Astrue*, 674
 13 F.3d 1104, 1115 (9th Cir. 2012) (explaining that "an error is harmless so long as there
 14 remains substantial evidence supporting the ALJ's decision and the error 'does not
 15 negate the validity of the ALJ's ultimate conclusion'"') (quoting *Batson v. Comm'r of Soc.*
 16 *Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)).

17 None of these activities, however, contradict plaintiff's testimony about the side
 18 effects of his medications, or his hand use limitation. The ALJ therefore failed to give
 19 any valid reasons for rejecting plaintiff's testimony regarding the side effects of his
 20 medication, i.e. difficulty thinking clearly, and his hand symptoms, and harmfully erred.

21 **B. The ALJ Harmfully Erred in Evaluating the Medical Opinion Evidence**

22 Plaintiff argues the ALJ erred in evaluating the medical opinion evidence. Pl. Op.
 23 Br., pp. 9–14. Plaintiff contends the ALJ erred by partially rejecting the opinions of
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1 examining doctor John Richard Coe, D.O., and the opinions of non-examining doctors
2 Norman Staley, M.D., and Alnoor Virji, M.D. See *id.*

3 i. The ALJ Harmfully Erred in Rejecting Dr. Coe's Opinions

4 Dr. Coe examined plaintiff on July 25, 2018. See AR 935–42. Dr. Coe opined
5 plaintiff could lift and carry 25 pounds occasionally and 15 pounds frequently. AR 941.
6 He opined plaintiff can stand and walk for eight hours in an eight-hour workday, and sit
7 for eight hours in an eight-hour workday. *Id.* He opined plaintiff cannot work more than
8 eight hours continuously, and cannot work above chest level. *Id.* Dr. Coe opined plaintiff
9 "cannot bend, lift, climb or undertake complex mental activities especially involving
10 deduction or making conclusions secondary to the severity of [his] pain." *Id.*

11 The ALJ found "Dr. Coe's opined limitations with regard to [plaintiff's] exertional
12 level and inability to perform complex work are unpersuasive." AR 25. The ALJ
13 reasoned Dr. Coe's opinions were inconsistent with plaintiff's activities of daily living,
14 and inconsistent with the opinions of Dr. Staley and Dr. Virji. AR 26.

15 Under current Ninth Circuit precedent, an ALJ must provide "clear and
16 convincing" reasons to reject the uncontradicted opinions of an examining doctor, and
17 "specific and legitimate" reasons to reject the contradicted opinions of an examining
18 doctor. See *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1996). Dr. Coe provided his
19 opinions as a consultative, examining, licensed physician. See AR 935–42. Those
20 opinions were contradicted by the opinions of Dr. Staley and Dr. Virji. See AR 125–28,
21 138–40.

22 The Commissioner recently changed the regulations applicable to evaluation of
23 medical opinions, eliminating a hierarchy among medical opinions, but still requiring
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1 ALJs to explain their reasoning and specifically address how they considered the
2 supportability and consistency of each opinion. See 20 C.F.R. § 404.1520c; Revisions
3 to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01 (Jan. 18,
4 2017). Neither party addresses whether the Commissioner's new regulations impact the
5 Ninth Circuit's standards. Regardless of the change to the regulations, an ALJ's
6 reasoning must be supported by substantial evidence and free from legal error. See
7 *Ford*, 950 F.3d at 1153–54 (citing *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
8 2008)); see also *Murray v. Heckler*, 722 F.2d 499, 501–02 (9th Cir. 1983). The Court will
9 therefore consider whether the ALJ specifically and legitimately explained how he
10 considered the supportability and consistency factors regarding Dr. Coe's opinions.
11 *Ryan v. Commissioner of Social Sec.*, 528 F.3d 1194, 1198–99 (9th Cir. 2008). This
12 standard is consistent with Ninth Circuit precedent and also with the 2017 regulations.

13 The ALJ erred in rejecting Dr. Coe's opinions as inconsistent with plaintiff's
14 activities of daily living. Although plaintiff's daily activities contradicted some of Dr. Coe's
15 opined limitations, such as lifting restrictions, the ALJ did not identify daily activities
16 contradicting Dr. Coe's opinions that plaintiff cannot work above chest level, and cannot
17 undertake complex mental activities.

18 The ALJ also erred in rejecting Dr. Coe's opinions as inconsistent with the
19 opinions of Dr. Staley and Dr. Virji. The existence of a conflict among doctors' opinions
20 is not a reason for picking one doctor over the others, it merely establishes an issue the
21 ALJ must resolve. See *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) ("The
22 ALJ is responsible for determining credibility, resolving conflicts in medical testimony,
23 and for resolving ambiguities."). The ALJ thus failed to provide valid reasons for
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1 rejecting Dr. Coe's opinions regarding plaintiff's ability to work above chest level and
 2 undertake complex mental activities, and harmfully erred.

3 ii. The ALJ Harmfully Erred in Rejecting the Non-Examining Doctors'
Opinions

4 Plaintiff argues the ALJ erred by rejecting Dr. Staley's and Dr. Virji's opinions
 5 regarding plaintiff's manipulative and environmental limitations. Pl. Op. Br., p. 14. Dr.
 6 Staley reviewed plaintiff's medical records as part of the initial consideration of plaintiff's
 7 claims. See AR 125–28. Dr. Staley opined, among other things, that plaintiff was limited
 8 in handling with his right hand, noting plaintiff was "BOD for handling to occasional." AR
 9 127. He opined plaintiff should avoid concentrated exposure to noise, vibration, and
 10 hazards. *Id.* Dr. Virji reviewed plaintiff's medical records as part of the reconsideration of
 11 plaintiff's claims. See AR 138–40. Dr. Virji opined plaintiff was limited in handling with
 12 his right hand, but noted plaintiff was "BOD for handling to frequent." AR 138. Dr. Virji's
 13 opinions matched Dr. Staley's regarding environmental limitations. See AR 140.

14 The ALJ rejected Dr. Staley's and Dr. Virji's handling limitations because they
 15 were "not consistent with the claimant's record as a whole, which shows generally good
 16 results, or no issues at all, with the use of pain medications." AR 24. The ALJ implicitly
 17 rejected Dr. Staley's and Dr. Virji's opinions that plaintiff should avoid concentrated
 18 exposure to hazards by failing to include it in the RFC, reasoning that those opinions
 19 were inconsistent with the overall medical evidence and plaintiff's activities of daily
 20 living. *Id.*

1 The ALJ erred in rejecting Dr. Staley's opinions regarding plaintiff's handling
 2 limitations.¹ An ALJ "may reject the opinion of a non-examining physician by reference
 3 to specific evidence in the medical record." *Sousa v. Callahan*, 143 F.3d 1240, 1244
 4 (9th Cir. 1998) (citations omitted). But an ALJ may not reject a medical opinion "with
 5 boilerplate language that fails to offer a substantive basis for" the ALJ's conclusion.
 6 *Garrison*, 759 F.3d at 1012–13 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.
 7 1996)). The ALJ summarized several medical findings regarding plaintiff's hand and
 8 shoulder pain. See AR 21–22. But the ALJ did not discuss how this evidence
 9 contradicted Dr. Staley's opined handling limitations, nor is any contradiction obvious on
 10 the face of that evidence. See AR 898, 927–28, 936, 940, 1001. The ALJ therefore
 11 erred in rejecting Dr. Staley's opined handling limitations.

12 The ALJ also erred in rejecting Dr. Staley's and Dr. Virji's opined environmental
 13 limitations. The ALJ did not provide any specific discussion about these opined
 14 limitations, or point to any evidence contradicting them. See AR 25. The ALJ made
 15 generalized reference to the medical evidence and plaintiff's activities of daily living, but
 16 failed to point to specific evidence in the record contradicting the doctors' opinions that
 17 plaintiff should avoid concentrated exposure to vibration, extremely cold temperatures,
 18 and hazards. The ALJ thus erred.

19 In sum, the ALJ failed to provide any valid reasons for rejecting Dr. Staley's
 20 opinion regarding plaintiff's handling limitations, and Dr. Staley's and Dr. Virji's opinions
 21 regarding plaintiff's environmental limitations. These opinions may have impacted the
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23 ¹ The ALJ did not harmfully err in addressing Dr. Virji's handling limitation opinion because in the RFC he
 24 limited plaintiff to frequent handling and fingering bilaterally. See AR 19. In other words, the ALJ did not
 25 reject Dr. Virji's handling limitation opinion.

1 outcome of the ALJ's determination, so the ALJ's failure to properly consider them was
 2 harmful error. See *Molina*, 674 F.3d at 1115.

3 **C. The ALJ Did Not Harmfully Err in Considering the Impact of Plaintiff's
 4 Obesity on His Impairments**

5 Plaintiff argues the ALJ erred by failing to consider the impact of obesity on
 6 plaintiff's other impairments. Pl. Op. Br., pp. 15–16. But plaintiff does not point to any
 7 evidence that obesity meets the criteria for a severe impairment in his situation, or that
 8 obesity impacts his other impairments. The burden of proof is on the claimant to
 9 establish impairments that must be included at the RFC stage. See *Tackett*, 180 F.3d at
 10 1098–99. Plaintiff has therefore failed to show the ALJ harmfully erred in failing to
 11 consider the impact of plaintiff's alleged obesity on his other impairments.

12 **D. Scope of Remand**

13 Plaintiff asks the Court to remand this matter for further administrative
 14 proceedings. Pl. Op. Br., p. 17. “The decision whether to remand a case for additional
 15 evidence, or simply to award benefits[,] is within the discretion of the court.” *Trevizo*,
 16 871 F.3d at 682 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). The
 17 Court agrees remand for further proceedings is the appropriate remedy.

18 On remand, the ALJ shall reevaluate plaintiff's testimony regarding his hand pain
 19 and the side effects of his medications. The ALJ shall reevaluate the opinions of Dr.
 20 Coe, Dr. Staley, and Dr. Virji. The ALJ shall reevaluate Plaintiff's RFC and the step four
 21 determination. The ALJ shall conduct all further proceedings necessary to reevaluate
 22 the disability determination in light of this opinion.

III. CONCLUSION

Based on the foregoing discussion, the Court finds the ALJ erred when he determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore is REVERSED and this matter is REMANDED for further administrative proceedings.

Dated this 4th day of March, 2021.

Theresa L. Fricke

Theresa L. Fricke
United States Magistrate Judge